

DOCKET / 7/1/98 / 10/1/98

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Deployment of Wireline Services
Offering Advanced Telecommunications
Capability

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SEP 25 1998

CC Docket No. 98-147
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Comments of
US XCHANGE, LLC

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September 25, 1998

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SUMMARY

In this proceeding the Commission has the opportunity to further the goal of providing advanced telecommunications and information services to all Americans. The Commission should ensure that incumbent local exchange carriers ("ILECs") provide advanced services in a fair and competitive manner and that barriers to entry to the local market are removed. By doing so the Commission will help promote innovation and investment by all participants in the telecommunications marketplace, both incumbents and new entrants, and stimulate competition for all services, especially advanced services.

The advanced services affiliate proposed by the Commission would not be truly separate, but would be an "assign" of the ILEC and should therefore be subject to the same competitive obligations. Moreover, any provision of advanced services through ILEC affiliates that are not subject to the obligations of section 251(c) involves a significant risk of anticompetitive behavior. US Xchange recommends that the Commission either withdraw its proposal to allow ILECs to provide advanced services through a separate affiliate not subject to section 251(c) or impose strict safeguards to prevent anticompetitive behavior.

US Xchange urges the Commission to take measures to promote competition in the local market and encourage deployment of advanced services by both ILECs and new entrants. The Commission should ensure that new entrants have the opportunity to collocate equipment on an ILEC's premises for interconnection and are given access to unbundled network elements, such as loops. US Xchange suggests that the Commission adopt strengthened collocation requirements to optimize space available for collocation and reduce unnecessary costs and

delays. In addition, the Commission should revise its rules regarding the provision of loops to competitors in order to further eliminate barriers to entry for entities that seek to provide advanced services.

Finally, US Xchange supports the Commission's determination that ILECs must make available for resale, at wholesale rates, certain advanced exchange access services that they generally offer to subscribers that are not telecommunications carriers. However, US Xchange strongly disagrees with any Commission proposal that involves modification of LATA boundaries.

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US XCHANGE, LLC**

US Xchange, LLC ("US Xchange"), by undersigned counsel, respectfully submits the following comments in response to the Notice of Proposed Rulemaking issued by the Federal Communications Commission ("the Commission") in the above-captioned proceeding.¹

US Xchange is a competitive local exchange carrier ("CLEC") that provide facilities-based and resold telecommunications services in Michigan, Wisconsin, Indiana and Illinois. This combination of facilities-based service offerings and resold services is used by US Xchange to deliver the benefits of competition to consumers on a widespread basis and to build a customer base to support the further deployment of its facilities. US Xchange is investing in a state-of-the-art network and fiber optic switching equipment that will enhance service speed, quality and reliability for customers. In addition to local phone service and features, US Xchange provides or is in the process of providing long distance, Internet, calling card and data services.

¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, released Aug. 7, 1998 ("Section 706 NPRM").

I. SEPARATE AFFILIATES

A. The Separate Advanced Services Affiliate Proposed by the Commission Would be a "Successor or Assign."

The Commission has proposed allowing incumbent local exchange carriers ("ILECs") to offer advanced services through in-region affiliates that would not be subject to the competitive obligations of section 251(c).² However, section 251(h)³ extends the obligations of section 251(c) to any entity that becomes a "successor or assign" of an ILEC after the date of enactment of the Telecommunications Act of 1996 ("1996 Act"). To the extent that the Commission's proposal allows ILECs to transfer property or benefits to affiliates providing advanced services, those affiliates would be deemed assigns of the ILECs.

An assign is an entity "to whom, property is, or will, or may be assigned"⁴ or a party who has received an assignment of property or contract rights.⁵ Strictly interpreted, an assign is a party who has received *any* assignment of property, benefits, or obligations. Even assuming arguendo that an ILEC could transfer *some* assets without an affiliate becoming an assign, the relationship between an ILEC and an advanced services affiliate that the Commission is currently

² 47 U.S.C. § 251(c) (1996); *Section 706 NPRM* at ¶ 83.

³ 47 U.S.C. § 251(h) (1996).

⁴ BLACK'S LAW DICTIONARY (6th ed. 1990).

⁵ *Restatement of Contracts Second*, Sec. 323, Comment b.

considering clearly exceeds the limits that might prevent an affiliate from being considered a successor or assign.

Although the Commission claims that the ILEC would have only an arms-length relationship with its advanced services affiliate,⁶ closer inspection of the *Section 706 NPRM* reveals that the Commission is proposing to allow significant and inappropriate interaction and transfer of assets between the ILEC and the advanced services affiliate. In an effort to ensure that the affiliate is separate from the parent ILEC, the Commission imposes structural separations and prohibits ILECs from transferring local loops⁷ or selling or conveying real estate⁸ to their advanced services affiliates. However, the Commission provides plenty of leeway for ILECs to transfer highly valuable assets to their advanced services affiliates and still remain free from the obligations of Section 251(c). Under the so-called *de minimis* exception, ILECs would transfer facilities used to provide advanced services, such as Digital Subscriber Line Multiplexers (DSLAMs), packet switches and transport facilities to their advanced services affiliates.⁹ The affiliates would be able to leave any or all of the transferred equipment in place,¹⁰ and may

⁶ *Section 706 NPRM* at ¶ 96.

⁷ *Id.* at ¶ 107.

⁸ *Id.* at ¶ 107.

⁹ *Id.* at ¶ 108.

¹⁰ *Id.* at ¶ 110.

receive additional transfers of materials used for trial purposes.¹¹ Moreover, the Commission is considering allowing advanced services affiliates to receive transfers of non-equipment assets, such as customer accounts, employees, brand names, and customer proprietary network information from their parent ILECs.¹² Any affiliate receiving an assignment of such significant assets used by an ILEC in its provision of local telephone exchange service is an "assign" and therefore subject to the competitive obligations of Section 251(c).

The Commission claims that it is not proposing to forbear from section 251(c) requirements, rather, it argues that it is setting forth a proposal under which an affiliate is not deemed to be an ILEC.¹³ However, the Commission *is* in effect proposing to forbear from section 251(c) requirements unlawfully because it is declining to apply the requirements to advanced services affiliates. The affiliates, as they are described in the *Section 706 NPRM*, are "assigns" of the ILECs and should therefore be subject to the same competitive obligations. If the Commission wishes to allow ILECs to provide advanced services through affiliates free of section 251(c) obligations it should preclude any transfer of property or benefits from ILECs to their advanced services affiliates.

¹¹ *Id.* at ¶ 112. Importantly, "trial" is not defined and therefore they could be "trials" that last a year or longer. This but one of the many indeterminacies in the Commission's proposal that would arguably enable a RBOC to conduct itself in a manner that is unlawful under the 1996 Act.

¹² *Id.* at ¶ 113.

¹³ *Id.* at ¶ 93.

B. Stringent Safeguards Are Needed to Prevent Advanced Services Affiliates from Enjoying Anticompetitive Advantages.

US Xchange advocates the establishment of stringent safeguards by the Commission should it elect to adopt some form of the advanced service affiliate proposal in the *Section 706 NPRM*. Any provision of advanced services through ILEC affiliates that are not subject to the obligations of section 251(c) involves significant risk of undermining the procompetitive policies of the 1996 Act. Safeguards are necessary to ensure that the advanced services affiliates do not enjoy special advantages to the detriment of competing local exchange carriers ("CLECs").

The Commission should forbid an advanced services affiliate from using the parent ILEC's brand name and should prohibit joint billing and marketing of services by an ILEC and its advanced services affiliate. An advanced services affiliate using the ILEC's brand name and jointly billing for voice traffic and advanced services will be undeservedly more attractive to consumers who already use the ILEC for their local service and want advanced services as part of a single package sold by one telephone company. Joint marketing would confer a similarly unacceptable advantage on the advanced services affiliate because it will cause the affiliate to be regarded by consumers as part of the same company as the ILEC. US Xchange urges the Commission to affirmatively prohibit these practices to prevent an advanced services affiliate from gaining an unfair advantage through its association with its parent ILEC.

US Xchange disagrees with the Commission's proposals to allow ILECs to transfer equipment to their advanced services affiliates in a discriminatory manner¹⁴ and to allow the affiliate to leave the "transferred equipment" in place.¹⁵ ILECs should not be allowed to offer any equipment available for transfer solely to its advanced services affiliate; it should be required to offer any equipment available for transfers to all CLECs on a nondiscriminatory basis. If the Commission does allow these discriminatory transfers of equipment, the transfers should be limited to equipment installed before the release of the *Section 706 NPRM* and be permitted only during a period immediately after the establishment of the advanced services affiliate as a legally separate entity. Moreover, if an ILEC intends to transfer equipment to its advanced services affiliate and leave it in place, the Commission should require that independent carriers be given the opportunity to request that they be able to place equivalent equipment in the central office as well.

Finally, US Xchange urges the Commission to keep these safeguards in effect until, at the earliest, the ILEC is declared non-dominant. As long as it is the dominant provider in the market, the ILEC can harm competition by favoring its advanced services affiliate and discriminating against competitors. If the Commission chooses an earlier date for sunset of these safeguards it will thwart competition and seriously disadvantage competitors.

¹⁴ *Id.* at ¶ 111.

¹⁵ *Id.* at ¶ 110.

II. PROMOTION OF COMPETITION IN THE LOCAL MARKET

A. The Commission Should Establish National Standards for Collocation.

US Xchange supports the Commission's proposal to establish national collocation standards pursuant to sections 201 and 251 of the 1996 Act.¹⁶ The adoption of national collocation standards will, as the Commission suggests, encourage the deployment of advanced services by increasing predictability and certainty, and by facilitating entry by CLECs providing advanced services in multiple states.¹⁷ These standards should be adopted as minimum requirements and the Commission should ensure that the states can adopt additional requirements to provide further collocation opportunities or to respond to state-specific issues.

1. Collocation Equipment

The Commission should prevent ILECs from impeding CLECs' deployment of advanced services by imposing unnecessary restrictions on the type of equipment the CLECs may collocate. ILECs should be required to permit collocation by CLECs of equipment used for interconnection and access, even if the equipment includes switching or switching-like capabilities. As the Commission notes, restrictions on collocation of this type of equipment creates a disincentive for CLECs to take advantage of more efficient integrated equipment.¹⁸ Moreover, for purposes of collocation, there should be no basis for differentiating between circuit

¹⁶ 47 U.S.C. §§ 201, 251 (1996); *Section 706 NPRM* at ¶ 123.

¹⁷ *Section 706 NPRM* at ¶ 123.

¹⁸ *Id.* at ¶ 129.

and packet switching equipment. US Xchange urges the Commission to ensure that ILECs allow collocation by CLECs of virtually *any* kind of telecommunications equipment used for voice and data transmissions, including, for example, DSLAMs and remote access management equipment.

2. Allocation and Exhaustion of Space

US Xchange endorses the Commission's proposal to require ILECs to offer collocation arrangements that reduce the space needed by each provider.¹⁹ In particular, US Xchange urges the Commission to require ILECs to offer cageless collocation. ILECs have substantially delayed competition by using caged collocation to impose a number of arbitrary and time consuming requirements concerning ordering, constructing and installing cages. Cageless collocation is no different technically from collocation within cages and, by optimizing the space available at the ILECs premises, will permit more CLECs to collocate equipment and provide competitive service. To prevent ILECs from thwarting competition, the Commission should establish detailed procedures, including time limits, under which ILECs must provide cageless collocation.

Because ILECs have the incentive and ability to impede competition by reducing the amount of space available for collocation, the Commission should take measures to ensure that sufficient space is made available to competitive carriers. US Xchange supports the Commission's proposal to require ILECs to prove that there is not enough space for collocation

¹⁹ *Id.* at ¶ 137.

by providing the CLEC with a tour of the premises.²⁰ US Xchange also supports the Commission's proposal to require ILECs to submit to CLECs upon request a report indicting the ILEC's available collocation space and any measures the ILEC is taking to make additional space available for collocation.²¹ In addition, the Commission should modify its rules on warehousing of space by incumbents. The Commission should clarify the standards for the amount of space ILECs may reserve for future use and require that, prior to denial of physical collocation, ILECs give up any space held in reserve. These proposals are not unduly burdensome for ILECs and will aid CLECs in combating anticompetitive behavior.

B. The Commission Should Establish National Standards for Local Loops.

US Xchange urges the Commission to adopt national standards for unbundling local loops.²² National standards will encourage the deployment of advanced services by increasing predictability and certainty, and by easing entry of CLECs providing advanced services in multiple states. US Xchange suggests that the Commission adopt as a national standard any unbundling option requested by a CLEC that any ILEC provides or has been directed to provide by a state commission. The national standards should serve as minimum requirements, allowing states to adopt additional local loop requirements or to respond to state-specific issues.

²⁰ *Id.* at ¶ 146.

²¹ *Id.* at ¶ 147.

²² *Id.* at ¶ 154.

1. Loops and OSS

US Xchange supports the Commission's proposal to require ILECs to provide requesting CLECs sufficient information about loops for the CLECs to determine independently whether the loops can support xDSL.²³ As the Commission notes, it is important that CLECs have the ability to make their own assessments because the parameters for determining whether a loop is capable of supporting xDSL may differ depending on the technology.²⁴ In addition, US Xchange urges the Commission to require ILECs to provide conditioned loops, free of bridge taps, load coils and midspan repeaters, upon request. These requirements are necessary for CLECs to provide advanced services.

2. Sub-Loop Unbundling

The Commission should mandate that ILECs provide sub-loop unbundling and collocation at remote terminals. In situations where there is insufficient space for the ILEC to collocate equipment or where a loop is provisioned by means of a digital loop carrier system, access by a CLEC at a remote terminal may be the only way that a CLEC can access the loop in order to provide advanced services. Contrary to the claims of ILECs, sub-loop unbundling is technically feasible and would not involve space constraints. In the event that existing pedestals or remote terminals do not have sufficient space to accommodate all requests for unbundled access, the Commission should require ILECs to construct, or allow the CLEC to construct, an

²³ *Id.* at ¶ 157.

²⁴ *Id.*

adjacent remote terminal. By extending the concept of loop unbundling to sub-loop elements the Commission would facilitate the deployment of advanced services and further the competitive goals of the 1996 Act.²⁵

IV. UNBUNDLING REQUIREMENTS

US Xchange disagrees with the Commission's suggestion that it should grant section 251(c) relief to ILECs that offer advanced services on an integrated basis.²⁶ This would directly conflict with the Commission's proposal that ILECs may only escape their section 251(c) obligations by providing advanced services through a separate affiliate. Moreover, the Commission does not have the authority to forbear from application of section 251(c).²⁷ Without unbundling obligations, ILECs can easily retard the provision of competitive services in contravention of the explicit intention of Congress in its historic revision of the Communications Act of 1934. Unbundling obligations are necessary to promote competition in the advanced services market and encourage widespread deployment of these services.

²⁵ *Id.* at ¶ 173.

²⁶ *Id.* at ¶ 184.

²⁷ 47 U.S.C. §160(d) (1996).

V. RESALE OBLIGATIONS

Section 251(c)(4) provides for resale of "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."²⁸ Advanced services will most likely be predominately offered to residential or business users or Internet providers, none of whom are telecommunications carriers. US Xchange agrees with the Commission's conclusion that advanced services marketed by ILECs generally to residential or business users or Internet service providers should be deemed subject to section 251(c)(4) resale obligations, regardless of their classification as telephone exchange service or exchange access.²⁹

VI. MODIFICATION OF LATA BOUNDARIES

US Xchange disagrees with the Commission's decision that it may modify LATA boundaries to allow Bell Operating Companies ("BOCs") to reach network access points.³⁰ Because it appears that a large number of persons in the United States do not live in a city or metropolitan area where a network access point is located,³¹ granting the relief requested would

²⁸ 47 U.S.C. § 251(c)(4) (1996).

²⁹ *Section 706 NPRM* at ¶ 189.

³⁰ *Id.* at ¶ 194.

³¹

This was pointed out in an earlier filing in the Section 706 proceeding by KMC Telecom, Inc. ("KMC"). See *Opposition of KMC Telecom, Inc.*, File No. NSD-L-98-99, filed August 10, 1998. KMC reached this conclusion using calculations based on information submitted by U S WEST. See *Petition of U S WEST Communications, Inc. for Relief From Barriers to Deployment of Advanced Telecommunications Service*, filed February 25, 1998. In its petition U S WEST included

involve more than minor modifications to particular LATA boundaries. Instead it would allow broad BOC participation in providing interLATA service and essentially abandon LATA boundaries as a restriction on BOCs' provision of long distance service.

Conclusion

For the reasons stated above, US Xchange urges the Commission to encourage deployment of advanced services and promote competition in the local exchange market. The Commission should ensure that ILECs provide advanced services in a fair and competitive manner and that barriers to entry to the local market are removed. Doing so will help the Commission meet its goal of expeditiously providing advanced telecommunications and information services to all Americans.

a map which purported to show the United States cities in which major backbone providers offer DS3 connections. The total population of these cities is 58,563,128 or approximately 21.9% of the population of the United States of 267,368,000 persons. By this calculation, 78% of persons in the United States lack a local DS3 connection. When the total population of any MSA is considered in cases where one of these cities is part of such an area, the total population of areas with DS3 service is 153,912,328, or only 57.5% of the United States population. Thus, even under this more expansive measure, approximately 43% of persons in the United States lack a local DS3 connection. Population figures taken from the *State and Metropolitan Area Data Book 1997-1998*, U.S. Bureau of the Census (5th ed.), Washington, DC 1998, pp. 172-177.

US Xchange, LLC
CC Docket No. 98-147
September 25, 1998

Respectfully submitted,

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